surviving the tenant for life; but under those circumstances I do not consider it any authority, and I must consider that where the gift is by substitution, the issue need not survive the tenant for life. Lord LANGDALE was also of opinion that they need not survive the tenant for life, and so decided in *Masters* v. *Scales*, 13 Beav. 60, although in *Bennett* vs. *Merriman*, 6 Id. 360, he had doubted it, and had come to a different conclusion; and Vice-Chancellor WOOD, in *Bennett's Trusts*, 3 Kay & J. 280, decided in accordance with my view. With regard to the question, whether the issue must survive their own parent, I think, as I have already stated, the principle to be applied is, that where the gift to the issue is original, it is not necessary; but that when it is substitutionary, it is necessary. Two cases came before myself in which the opinions are at variance; viz. *Harcourt* v. *Harcourt*, 26 L. J. Ch. 589, in which I stated the same principles; and *Humfrey* v. *Humfrey*, 2 Drew. & S. 49, in which I consider that I ought not to go against the authorities, and decided, reluctantly, not to include the children who had predeceased their own parent. But now having gone through all the authorities, and very much considered the point, I think that I should not be justified in adhering to that view; and, therefore, I must hold that, where the gift is original to the issue, they need not survive their own parent, but that where the gift to them is by substitution, it is necessary.[1]

Vice-Chancellor Kindersley's Court.

RE TURNER.

A testator bequeathed 500*l.* upon trust for his daughter for life, and directed that if she should die without issue (which event happened) the fund should be paid to his four sons, share and share alike, but in case any or either of his sons should be then dead, he directed that the share of him or them so being dead should be paid to his or their child or children, share and share alike, but if there should be no child, then to his or their legal personal representatives:

Held, that the gift to the son's children was substitutionary, and, therefore, that such children as did not survive their parents were excluded from the terms of the gift, though it was not necessary that such children should survive the tenant for life:

Held, also, that no exception could be made in the present case to the general rule, that the term "legal personal representatives" must be construed as "executors and administrators."

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[1] See note at the end of the following case, post, p. 238.

THIS was a petition for payment out of court and division of a fund, involving questions of a similar nature to those which were raised in the previous petition (*Lanphier* v. *Buck*), and judgment had therefore been reserved in the former case till the arguments in the present case had been concluded. The judgments in each petition were delivered together. The facts of the present petition were these:—

Thomas Turner, by his will dated the 5th April 1805, bequeathed the sum of 500*l.* to trustees upon trust, to pay the income to his daughter Margaret Moyle for her life, and after her decease to apply the interest of the said sum of 500*l.* towards the maintenance and education of such child or children as she should leave at her decease, until he, she, or they should attain his, her, or their age or ages of twenty-one years, and upon his, her, or their attaining that age, to pay over and equally divide the said sum of 500*l.* between and amongst them, if more than one share and share alike, but if there should be but one child then to such only child; and if his said daughter should die without issue, then he willed and directed,

"That the said sum of 500*l.*, together with the interest thereof, if any then due, shall be paid unto and amongst my sons Thomas, John, William, and Zachary Turner, share and share alike; but in case any or either of my said sons shall be then dead, I will and direct that the part or share of him or them so being dead shall be paid to his or their child or children, share and share alike if more than one, and if but one, then to such only child; but if there be no child, then to his or their legal representatives, and upon no other trust whatever."

The testator gave his residuary personal estate upon the same trusts as he had given the 500*l.*

In 1806 the testator died, leaving his five children mentioned in his will surviving him, they being also his sole next of kin.

In 1829 Thomas the son died; in April 1835 Zachary died a bachelor; in June 1835 William died; in 1839 John died; in 1864 Margaret Moyle died, without having ever had a child.

The sons, Thomas, William, and John, had children, some of whom died in the testator's lifetime or early infancy; others died in the lifetime of their respective fathers, and some, having survived their fathers, died in the lifetime of Margaret Moyle, the tenant for life; some survived Margaret Moyle.

Differences having arisen as to the division of the 500*l.* and the residue, the trustees paid the funds into court. The present petition was by the grandchildren of the testator who survived Margaret Moyle.

The following questions arose :—

First, as to the shares of the sons Thomas, William, and John, whether the classes of children to take were all the children in being at the death of the testator or subsequently born ; or only such of them as having survived their own parents survived the tenant for life.

Secondly, as to Zachary's share, whether in the gift of the 500*l.* the words "legal representatives" meant "executors or administrators" or "next of kin" according to the Statute of Distributions.

Thirdly, whether such next of kin, if it were so held, were to be ascertained at the death of Zachary or at the death of the tenant for life.

Fourthly, whether Mrs. Moyle, the tenant for life, was included.

Fifthly, whether they took in equal shares *per capita*, or in unequal shares *per stirpes;* and

Sixthly, whether they took as tenants in common or as joint tenants.

Shapter, Q. C., for the petitioner.

E. Charles, for respondents, being grandchildren of the testator who survived their own parents, but died in the lifetime of the tenant for life.

C. A. Turner for other respondents, being children of testator's sons who, being alive at the testator's death, died in their father's lifetime.

Shapter, Q. C., in reply.

Cases cited: *Pearson* v. *Stephen*, 5 Bligh. N. S. 203; *Christopherson* v. *Naylor*, 1 Mer. 320; *Salisbury* v. *Petty*, 3 Hare 86, 93; *Eyre* v. *Marsden*, 2 Keen 564; *Loring* v. *Thomas*, 1 Dr. & Sm. 497; *Harcourt* v. *Harcourt*, 26 L. J. N. S. 536, Ch.; *Humfrey* v. *Humfrey*, 2 Dr. & Sm. 55; *Bennett* v. *Merriman*, 6 Beav. 360; *Macgregor* v. *Macgregor*, 2 Coll. C. C. 192; *Holgate* v. *Jennings*, 11 L. T. Rep. N. S. 501; *Erause* v. *Cooper*, 1 J. & H. 210; *Masters* v. *Scales*, 13 Beav.

60; *Re Kirkman's Trusts*, 3 De G. & J. 558; *Penny* v. *Clarke*, 1 De G. F. & J. 425; *Re Corrie's Will*, 32 Beav. 426; *Booth* v. *Vicars*, 1 Coll. C. C. 6; *Walker* v. *Marquis Camden*, 16 Sim. 329; *Smith* v. *Palmer*, 7 Hare 229; *Barker* v. *Barker*, 5 De G. & S. 759; *Re Bennett's Will*, 3 K. & J. 281; *Re Wildman's Trusts*, 1 J. & H. 299; *Re Pell's Trusts*, 3 De G. F. & J. 291; *Askling* v. *Knowles*, 3 Drew 593; *King* v. *Cleveland*, 4 De G. & J. 482; *Bullock* v. *Downe*, 9 H. L. Cas. 1; *Reed* v. *Snell*, 2 Atk. 57; *Leek* v. *McDowell*, 32 Beav. 28.

The VICE-CHANCELLOR.—We find in this case an illustration of what I stated in the case of *Lanphier* v. *Buck*, as to a gift by substitution, there being an absolute gift in the first instance, with a divesting clause, and on this point the observations I made in the other case apply to this. The next question is, what is meant by "legal representatives." On the one hand, it is contended that it means "executors or administrators;" on the other hand, that it means "next of kin." If it means executors or administrators, then there is an end to all question; but if it means next of kin, the same questions arise as in *Lanphier* v. *Buck*, and the same observations apply to this case. The rule is, that representatives or legal representatives primarily mean executors or administrators, and in order to put any other meaning on it, you must find some reason for doing so in the will. But it appears to me that, so far from finding anything in the will to the contrary, we find that the testator intended it to be so used. Mrs. Moyle lived till 1864, and died without leaving any children, upon which event the gift over was to take effect, and the fund to go over to the four sons. Zachary, one of the sons, had died a bachelor, in the lifetime of Mrs. Moyle, and therefore the question is, whether under the term "representatives," Zachary's share should go to the executors or administrators, as part of his assets, or to his next of kin. The testator had given to Zachary an absolute interest; it is true he divests it if Zachary died in the sister's lifetime, and then it was to go to his children; but if there were no children, the original gift should remain, and the share go to his executors and administrators; and it appears to me that such is the intention shown on the will. In many cases "representatives" has been construed "next of kin," because some such words as "share and share alike" have been found joined to them, and such

words could not apply to executors; the words "unto and among" also implying a tenancy in common, have had the same effect, being contrary to the position of executors; and in the same way a gift to representatives "to take *per capita* and not *per stirpes*." In the case of *Robinson* v. *Smith*, 6 Sim. 47, where the testator gave a fund to the husband of his daughter as trustee for the daughter for life, and after her death upon trust for such persons as she should appoint; and, in default of appointment, in trust for her legal representatives; the term was held to be next of kin, because the husband, as trustee, was directed to pay it, whereas, if it meant representatives under the statute, he would retain it instead of paying it. It therefore appears to me that the share of Zachary goes to his legal personal representatives as part of his estate; and as to that share the other questions do not arise. With regard to the other shares, the gift being substitutionary, the same questions arise as in *Lanphier* v. *Buck*, and all the conclusions at which I arrived in that case apply here, except that in this case, the gift to the children being substitutionary, I am of opinion that such children as did not survive their own parent will be excluded.

Costs out of the fund.

The accidental circumstance of two successive petitions, raising similar questions of construction, coming on for argument before Vice-Chancellor KINDERSLEY on the same day, enabled his Honor to deliver a judgment in the principal case in which the whole question of gifts, by which children are substituted in the place of their parents, is carefully and clearly summed up, and one, at least, of the unsettled points in connection with the subject is settled.

The distinction between cases of independent and substitutionary gifts to the issue of a class of children has been long recognised. The former cases occur wherever the children, and the issue of children from two distinct classes, and the objects of the second class take under a substantive gift, and not expressly by way of substitution, for the members of the first class, *e. g.*, a gift to the children of A., *and* the issue of such children of A. as shall have died before a given period. There the gift to the issue of the children is said to be an independent gift. The latter cases occur wherever there is first a gift to a class of children, and then a gift over of the shares of members of this class upon their respective deaths to their issue, *e. g.*, a gift to the children of A. with a gift over in case any of such children of A. as shall have died before a given period, or a gift to the children of A. living at a certain period, *or* the issue of such of them as shall have previously died. There the gift to the issue of the children is said to be substitutionary. It is not easy to see any real distinction in principle between these cases, and, probably, if all the decisions upon the question of the vesting of legacies could be disregarded, and what has been called "the pole-star in the construction of devises," viz.,

the testator's intention, were to be followed, all the cases of the kind we have mentioned, in which the obvious intention is to put the issue in the place of their parents in a certain event at a certain time, would be governed by the same rule. But, as it happens, the distinction has been firmly established by authority, and it becomes necessary to accept it as the basis upon which further developments upon the same subject must proceed. In accordance with this distinction, it has been determined that under a (so-called) independent gift to a class of children living at a given period, and the issue of such of those children as shall be then dead, the issue of a child dying in the testator's lifetime or dead at the date of the will, are entitled (*Colthurst* v. *Carter*, 15 Beav. 421); whereas, under a (so-called) substitutionary gift to a class of children living at a given period with a gift over of the shares of members of the class to their issue, the gift over would not comprise the issue of a child dead at the date of the will, although it would, unless preceded by a life interest, comprise the issue of a child dying in the lifetime of the testator: *Cort* v. *Winder*, 1 Coll. 320. If a previous life interest were interposed, the substitutionary gift would only include the issue of a child who survived the testator: *Ive* v. *King*, 16 Beav. 56. These cases, however, only determined what *classes* of issue were entitled to take under gifts of this character. They did not decide what was the effect upon the shares of members of such classes of their own deaths before the period fixed for the distribution or the property. It is also to be observed that in these cases there was no express direction that issue should take only their parents' shares. Two principal questions, therefore, remained to be considered. First. Can any member of a class of issue take who predeceases the child through whom he claims? Secondly. Must every member of the class of issue survive the period of distribution where this contingency is expressly attached to the gift to the children, but is omitted in the gift to the issue of such children?

The Vice-Chancellor has dealt with both these questions in the principal cases, and has determined as to the first that in the case of a (so-called) independent gift (*Lanphier* v. *Buck*, ante 224), every member of a class of issue is entitled to take whether he survives the child through whom he claims or not, but that in a case of a (so-called) substitutionary gift (*Re Turner*, ante 234) no issue of a child can take who does not survive his own parent; and as to the second question, that whether the gift be in form independent or substitutionary, no distinction is caused by the circumstance mentioned, but that, in the absence of express words, the court will not imply in the gift to the issue a contingency similar to that attached to the interest of the parents.

We must, we suppose, accept the decision on the first point, as the necessary consequence of the previous authorities as to the distinction between (so-called) independent and substitutionary gifts. We regret that the Vice-Chancellor felt bound to observe this distinction, and that he did not decide, broadly, that all cases where, as in the principal cases, there is an express direction that the issue shall take the parent's share, and the intention is thereby shown to place the issue in the place of the parent, no issue can take any vested interest during the parent's lifetime, but that the members of the class of issue to take are to be ascertained at the death of the parent. If this course had been adopted these gifts, which may be denominated "representative gifts," would have been brought under a single rule of construc-

tion, reasonable in principle and convenient in practice. We think that there was no absolute necessity for extending the distinction we have pointed out between independent and subsitutionary gifts to representative gifts, and there was a strong argument in favor of disregarding it, derived from the circumstance that in both cases the intention of the testator to place the living issue in the place of their dead parents, was clearly shown by the words used that they should take only their parent's share.

We cordially concur in the view of the Vice-Chancellor on the second point, that the circumstance that the parents are required to survive the tenant for life in order to take any share, does not imply that none of the issue of the parents can take unless they themselves survive the same period.

As there has been much conflict of judicial opinion upon this point, it may be well to give, in brief chronological order, the results of the various reported cases. In *Pearson* v. *Stephen*, 5 Bl. 203 (1831), it was assumed, without argument (the time not having arrived for deciding the point), that in a so-called independent gift, viz., to A. for life, remainder to the five sons of the testator living at the death of A., and their respective issue, no issue of a deceased son could take who did not survive the tenant for life. In *Bennet* v. *Merriman*, 6 Beav. 360 (1843), where the gift was substitutionary, Lord LANGDALE held the words of contingency expressed in the case of the parents, ought to be implied in the case of the issue. A similar conclusion was arrived at by Lord Justice KNIGHT BRUCE (then Vice-Chancellor), in *Macgregor* v. *Macgregor*, 2 Coll. 193 (1845), in the case of a gift independent in point of form. In both these cases there were directions that the issue should only take their parents' share. On the other hand, in *Lyon* v. *Coward*, 15 Sim. 287 (1846), Vice-Chancellor SHADWELL held that where the gift to the issue was independent in point of form, the contingency ought not to be implied. It is to be observed that *Macgregor* v, *Macgregor* was not cited in this case. In *Masters* v. *Scales*, 13 Beav. 60 (1850), Lord LANGDALE refused to import the contingency into a substitutionary gift. Vice-Chancellor PARKER followed *Lyon* v. *Coward* in *Barker* v. *Barker*, 5 De G. & Sm. 753 (1852), as also did Vice-Chancellor KINDERSLEY in *Harcourt* v. *Harcourt*, 5 W. R. 478 (1857), and Vice-Chancellor WOOD in *Re Bennett's Trust*, 3 K. & J. 281 (1857), all cases of gifts to issue, independent in point of form, coupled with directions that the issue should take their parents' shares only. In *Penny* v. *Clarke*, Johns. 621 (1859), Vice-Chancellor WOOD decided in the same way in a precisely similar case of independent gift, and his decision was confirmed on appeal to the Lord Justices (8 W. R. 286; 1 De G. F. & J. 425), in consequence of Lord Justice TURNER concurring in the view of the judge in the court below. Lord Justice KNIGHT BRUCE differed, considering that his opinion, as expressed in *Macgregor* v. *Macgregor*, ought also to be applied in the case of gifts in a so-called independent form. In *Crause* v. *Cooper*, 1 J. & H. 210 (1859), Vice-Chancellor WOOD hinted (the point did not call for a decision) that a different rule should be applied in the case of a purely substitutionary gift, and that there the contingency which was expressed in the gift to the parents should be implied in the gift to the issue. In *Re Wildman's Trust*, 1 J. & H. 299 (1860), Vice-Chancellor WOOD considered the bequest to be an independent gift to the issue, and refused to import words of contingency. A similar conclusion was arrived at in *Pell's Trust*, 9 W. R. 733; 3 De G. F. & J. 291 (1861), where, in

a case of independent gift, Lord Justice TURNER approved of the decision of Vice-Chancellor STUART in the court below. Lord Justice KNIGHT BRUCE still adhered to the principle of his decision in *Macgregor* v. *Macgregor*. In *Humfrey* v. *Humfrey*, 10 W. R. 286, 2 Dr. & Sm. 49 (1862), Vice-Chancellor KINDERSLEY considered himself bound by previous authorities to hold that in a case of independent gift to issue those who pre-deceased their own parent, as well as the tenant for life, were excluded. Lastly, in *Corrie's Will*, 32 Beav. 426, and *Holgate* v. *Jennings*, 5 N. R. 120, the present Master of the Rolls, in cases of substitutionary gifts, approved and followed the decision of Lord Justice KNIGHT BRUCE in *Macgregor* v. *Macgregor*. The result of the consideration of these authorities is that Lord Justice KNIGHT BRUCE considers that the words of contingency expressed in the gift to the parents ought to be implied in the gift to the children, whether the gift be, in form, independent or substitutionary; that Sir JOHN ROMILLY considers that they ought to be implied in cases of purely substitutionary gifts; that Lord LANGDALE was of opinion that they ought not to be implied in cases of substitutionary gifts; that Vice-Chancellor LEACH, Vice-Chancellor SHADWELL, Vice-Chancellor PARKER, Lord Justice TURNER, Vice-Chancellors KINDERSLEY, STUART, and WOOD have decided against the implication in cases of independent gifts; but that Vice-Chancellor WOOD doubted the propriety of extending this decision to the case of gifts by way of substitution.

Vice-Chancellor KINDERSLEY has decided, in the principal cases, that in gifts of the character in question, there is no distinction between (so-called) independent and substitutionary gifts, but that words of contingency, pointing to the necessity of surviving the period of distribution, which are expressed in the bequests of the parents, are not to be implied in the bequests to the issue. We trust that the decision in this respect will be acquiesced in, and that this point may be considered as now settled.—*Solicitors' Journal.*

Court of Queen's Bench

AUSTIN *v.* BUNYARD.

An instrument which, upon its face, requires a certain stamp is inadmissible in evidence if it bears that stamp, although there are facts connected with it which, if inquired into, show that it ought to have borne a different stamp.

Held, therefore, in an action against the maker of a post-dated banker's check, which was stamped only with the ordinary penny stamp, that although it subjected the parties to it to a penalty for not being stamped with a bill-of-exchange stamp, was, nevertheless, receivable in evidence.

THIS was an action by the holder of a check payable to bearer, dated the 22d July 1864, for 350*l.* 12*s.* 6*d.*, against the maker, in which the defendant pleaded pleas denying the making, and that the plaintiff was the holder. At the trial before COCKBURN, C. J., the defendant objected to the admissibility of the check, on